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Supreme Court, U.S.
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No. 02-370

IN THE

Supreme Court of the United States

ANCHOR HOCKING, INC.,

Petitioner,

v.

ARLEEN E. WADDILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

Oregon formulated the "rational juror" standard following *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) ("*Oberg (federal)*"), modeling it, as the Respondent herself emphasizes, on an expressly deferential "rational factfinder" standard for reviewing findings of historical facts.[1] Oregon has adhered to this standard even after *BMW v. Gore*, 517 U.S. 559 (1996), and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), held that the amount of punitive damages is not a "fact," and must be subject to de novo review that encompasses considerations of matters outside the record and beyond the jury's competence.

This case is not about an isolated judicial error that resulted in an aberrant million dollar punitive award. This Court receives a steady diet of petitions concerning Oregon civil judgments (*e.g.*, *Key Pharmaceuticals v. Edwards*, No. 02-342 (petition for a writ of certiorari filed August 30, 2002; amicus briefs filed by Associated Oregon Industries (October 4, 2002) and the American Insurance Association (October 7, 2002); held after conference on November 8, 2002)) because the Oregon courts have persistently refused to conform their punitive damages standard of review to the constitutional guidelines articulated by this Court.

The Respondent fails even to address the application of the *BMW/Cooper* standard to this case, a failing that mirrors the

1. As the Respondent states (Opp. at 9, 19), the template for Oregon's "rational juror" standard was *Jackson v. Virginia*, 443 U.S. 307 (1979), which held that

> a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution,

and that the court may allow habeas relief only if "no rational factfinder" so viewing the record evidence could have found proof of guilt. *Id.* at 324-26.

error of the Oregon courts themselves. For example, the Oregon Court of Appeals in this case made no effort at all to apply the third *BMW* factor, comparability of the punitive award to legislative penalties. Confronted with evidence that the Oregon legislature — the body to whom the Court has said lower courts *should* defer — had prescribed penalties 1/200 the size of the punitive award in this case for conduct more egregious than anything Anchor Hocking was even accused of, the Oregon Court of Appeals simply ignored the evidence and the required comparison.[2] The Respondent also fails to acknowledge the conflict in the lower courts about the applicability of the Excessive Fines Clause, a stark conflict appropriate for review.

Finally, *State Farm v. Campbell*, No. 01-1289 (set for argument December 11, 2002) cannot be brushed aside as a reason to grant review or hold this case, on the ground that *State Farm* involves only extraterritoriality. *State Farm* plainly involves the applicability of the *BMW* guideposts, as well as the constitutionality of extraterritorial punishment. *See* Petition for a Writ of Certiorari in *DeKalb Genetics Corp. v. Bayer Crop Science S.A.*, No. 02-130 (filed July 24, 2002, held after conference on September 30, 2002) at 7-8, 22-24; *Key* Petition

2. Indeed, the Oregon Court of Appeals apparently believed that the comparative penalties guidepost required analysis only of other punishments that had been imposed *on Anchor Hocking* for the actions giving rise to this lawsuit (failing to warn that perfectly manufactured and designed fishbowls may develop imperceptible cracks and failing to keep records of three prior manufacturing-defect lawsuits). *Waddill v. Anchor Hocking*, 175 Or. App. 294, 306, 27 P.3d 1092, 1099 (2001) (16a). Whether a defendant has been previously punished for its alleged misconduct is an element of the Oregon substantive standard for determining whether to award punitive damages at all, incorporated by reference into the "rational juror" standard. *Id.* at 301-02, 27 P.3d at 1096 (9a-10a), *citing* ORS 30.925. It is not, however, part of the *BMW/Cooper* standard, nor is it a substitute for the comparative penalties analysis that *BMW/Cooper* require. Indeed, part of the failing of the "rational juror" standard is that it points to statutory considerations that concern whether punitive damages should be awarded at all, and not how much should be awarded.

at 13, 30 (held after conference on November 8, 2002). In any event, this case, like *State Farm*, does involve an issue of extraterritoriality, for the punitive damages award below was based upon alleged misconduct outside Oregon, and its scale was determined by the Petitioner's nationwide sales activity.

I. The Errors Have Been Preserved.

The Respondent asserts that Anchor Hocking waived the constitutional issues, claiming that it cited only the state "rational juror" standard in challenging the $1 million punitive damages award in this case. Opp. at 5. That is untrue. Anchor Hocking has contended — consistently, for more than seven years — that the award violates the federal Due Process and Excessive Fines Clauses. The Oregon Court of Appeals itself recognized that Anchor Hocking "filed the appropriate post-trial motion for raising [the federal excessiveness] issue." *Waddill*, 175 Or. App. at 305 n.7, 27 P.3d at 1098 n.7 (15a).

The record confirms Anchor Hocking's preservation of constitutional error. First, during trial, the plaintiff stipulated that Anchor Hocking's due process challenges (including, but not limited to, "procedural" due process or the "rational juror" standard) were preserved for review.[3] Anchor Hocking's

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3. The Respondent's trial counsel (her counsel of record in this Court) affirmed at trial that "[w]e have stipulated [that the following] affirmative defenses are preserved, as legal defenses":

> The imposition of punitive damages against the defendant would violate its constitutional rights under the due process clauses in the Fifth and Fourteenth Amendments to the Constitution of the United States and the excessive fine clause in the Eighth Amendment to the Constitution of the United States and the provisions of the Oregon Constitution. That's the fourth affirmative defense.
>
> The fifth affirmative defense is plaintiff's claim for punitive damages [is improper], to the extent it seeks an award in excess of a rational, what a rational juror would

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post-trial motion challenged the punitive award as exceeding the substantive constitutional limit, anticipating the standards of *BMW* and expressly preserving the right to invoke any further articulation of the due process standards. CR 42 at 13-16. Anchor Hocking continued to press all of the constitutional theories it asserts in this Court — the primacy and applicability of the *BMW* guideposts, improper extraterritorial punishment, and excessive fines — at every stage of the appellate process.[4]

Nor is there merit to the plaintiff's contention that Anchor Hocking failed to invoke *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001), and *Cooper*. Opp. at 5. *Parrott* (holding that the "rational juror" standard is the appropriate standard in Oregon even after *BMW*) was issued while Anchor Hocking's petition for reconsideration was pending before the Oregon Supreme Court. *Cooper* was issued after *Parrott*, and after the Oregon Supreme Court granted reconsideration in this case, remanding precisely so that an Oregon reviewing court

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> be entitled to award, taking into consideration the facts and circumstances of this action.

Tr. 558.

4. *See* Opening brief in the Court of Appeals (07/18/96) at 2, 27-39; Reply brief in the Court of Appeals (02/05/97) at 6-10; Response to the plaintiff's petition for review in the Oregon Supreme Court (02/09/98) at 25-28 (urging that if the court granted review of the Court of Appeals' August 1997 decision reversing and remanding for a new trial on state-law grounds, it should also consider the punitive damages issues); Merits brief in the Oregon Supreme Court (07/13/99) at 45-49; Petition for reconsideration in the Oregon Supreme Court (08/09/00) at 1-2, 12-17 (noting that the July 2000 decision reversing the Court of Appeals' August 1997 opinion and ordering that judgment be entered for the plaintiff was improper because no Oregon reviewing court had considered Anchor Hocking's assignments of error concerning punitive damages); Request for supplemental briefing on remand to the Court of Appeals to address, *inter alia*, this Court's recently-issued decision in *Cooper* (06/05/01); Petition for review to the Oregon Supreme Court (10/10/01) at 1-8, 22-28.

could consider — for the first time — the punitive damages issues. Indeed, Anchor Hocking sought leave to brief *Cooper* on remand, but the Oregon Court of Appeals refused.

Finally, Anchor Hocking properly preserved its contention that the $1 million punitive award includes impermissible extraterritorial punishment. Anchor Hocking repeatedly sought to limit the improper use of evidence of prior complaints (including the case from Tennessee that it won) during trial. These complaints were admitted only for "notice" that Anchor Hocking had been sued, but the plaintiff nonetheless improperly argued their supposed merit. *See, e.g.*, Tr. 473, 618-19, 622, 631, 653-54. Anchor Hocking consistently objected on extraterritoriality grounds to the use of its net worth and nationwide profits on all products as benchmarks for imposing punitive damages.[5]

II. Oregon's "Rational Juror" Standard Conflicts with *Cooper* and *BMW*.

The Respondent defends Oregon's "rational juror" standard by tracing its lineage to this Court's decision in *Jackson*, 443 U.S. at 324 (1979). Opp. at 9. Any reliance on *Jackson* (providing for sufficiency-of-the-evidence review of historical facts found by the jury) is misplaced because the analysis of excessiveness under the Due Process Clause does not involve review of a jury's factual findings.[6] As the Court stated in

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5. Indeed, Anchor Hocking's preservation of the constitutional issues (acknowledged by the Oregon Court of Appeals) sets this case apart from *Key* (where the same court found no preservation). This case, like *Key*, should at least be held pending disposition of *State Farm*.

6. It is typically impossible to determine what facts (if any) the jury found in setting an amount of punitive damages or the relative weight it gave to any facts it may have found. A rule requiring deference to phantom findings is unworkable because it necessarily rests on speculation about the jury's reasons. *See DeKalb* Petition at i, 11-13

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Cooper, "the jury's award of punitive damages does not constitute a finding of 'fact.'" 532 U.S. at 437. *BMW/Cooper* require a comparative legal analysis that examines factors outside the record in order to determine whether the defendant "receive[d] fair notice . . . of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. The *BMW* analysis assumes that a rational jury could have rendered the award consistently with the record and proper instructions. Indeed, if there were any question whether the award comported with the record and instructions or otherwise complied with state law, a court would properly address those issues first, avoiding any constitutional issue. Oregon's "rational juror" standard is unconstitutional because it prohibits what *BMW/Cooper* mandate — an evaluation of factors and evidence that were never before the jury under legal standards the jury was never told about and for which courts, not juries, have expertise.

This Court has itself applied *BMW/Cooper* without deferring to the jury and without limiting itself to the evidence presented at trial. For example, in determining the degree of reprehensibility of the defendant's conduct in *BMW*, this Court did not confine itself to evidence of record, but examined case law and statutes relevant to the gravity of the applicable conduct. *See* 517 U.S. at 565-76. The Court created a spectrum of reprehensibility by using other cases and then evaluated the defendant's reprehensibility according to its location on this spectrum. This comparison obviously goes beyond review of the rationality of a jury finding. Similarly, proportionality review involves application of a legal standard meant to gauge the reasonableness of the award (*see id.* at 580-82), not an examination of the record to find support for the jury's verdict. Finally, the comparison of the punitive damages award to

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(seeking review of the Federal Circuit's requirement that courts base their reprehensibility analysis on facts the jury may have found; the Federal Circuit acknowledged that the analysis it mandated rendered reprehensibility review under *BMW/Cooper* "essentially meaningless").

legislative sanctions for comparable conduct is a legal inquiry that no jury undertakes. *See id.* at 583-84. Indeed, this guidepost is "more suited" to appellate review because it calls for "a broad legal comparison." *Cooper*, 532 U.S. at 440.

Notwithstanding *Cooper*, the "rational juror" standard requires deference to the amount a jury awards by treating it like an historical fact. By design, this standard provides no tools for gauging whether the amount awarded was proper. Whether the award satisfies the "rational juror" standard depends "on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue." *Parrott*, 331 Or. at 538, 17 P.3d at 481 (internal citation and quotation omitted). ORS 30.925 supplies seven factors for determining whether any award of punitive damages in a product liability action is appropriate. None of the factors addresses the amount a jury should award, leaving this calculus to the jury's discretion. Such reflexive deference to the jury is no different from the highly deferential review struck down in *Oberg* (*federal*).

Without acknowledging the conflict between the "rational juror" standard and *BMW/Cooper*, the Respondent resorts to analytical sleight of hand. She contends that Anchor Hocking received adequate review below because the Oregon Court of Appeals reviewed de novo *the trial court's* decision not to reduce the $1 million punitive award. Opp. at 13-22. It is impossible to know what the trial court did in this case with respect to the Due Process analysis, for it denied Anchor Hocking's post-trial motions without explanation.[7] *See* 19a-21a. More importantly, the de novo review mandated in *BMW/Cooper* would be eviscerated if in Oregon all it meant was secondary review by the appellate court of the trial court's finding that the jury acted rationally based on the evidence presented. *BMW/Cooper* require

7. Both *BMW* and *Cooper* were issued after the trial court considered Anchor Hocking's post-trial motion. The trial judge in this case also presided in *Oberg*, where on remand the Oregon Supreme Court both announced and applied the "rational juror" standard and refused to reduce the punitive damage award.

that all Oregon courts, at every level, engage in the same exercise: review of the jury's award de novo, taking into account facts and policies that go well beyond those the jury did consider, or could properly have considered. Compelling the trial court to defer to the jury's findings, as Oregon does, and then relegating the state appellate courts to a second-order "de novo" review of the trial court's deferential review of the jury's decision, as Oregon does, falls greviously short of the constitutional minimum established by this Court.

The Oregon Court of Appeals did not in fact conduct a de novo review of the jury's award under *BMW/Cooper*. After refusing to take additional briefs about the new *Cooper* decision, the Oregon Court of Appeals mistakenly treated *Cooper* as dealing only with the standard of appellate review, ignoring *Cooper*'s statements that *BMW* settled the substantive due process standard and that the amount of punitive damages is not a fact entitled to deference. *Waddill*, 175 Or. App. at 302 n.5, 27 P.3d at 1097 n.5 (2001) (11a). Its application of *BMW* was worse. To be sure, the Court of Appeals recited the constitutional principles set forth in *BMW*. "[I]ts application of them," however, was "nothing short of baffling." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (per curiam) (summarily reversing lower court opinion for its facially accurate recitation but erroneous application of this Court's precedents). For example, after acknowledging that *BMW* required a review of "the civil and criminal sanctions provided for comparable misconduct," *Waddill*, 175 Or. App. at 305, 27 P.3d at 1098 (internal citation and quotation omitted) (16a), the Oregon Court of Appeals conducted no review at all. Instead, it said "there is no evidence of any other punishment *imposed on defendant* for these actions." *Id.* at 306, 27 P.3d at 1099 (16a) (emphasis added).[8]

8. Application of the proper standard in this case would not be an empty exercise. The Court of Appeals in *Parrott* applied *BMW* and reduced a $1 million punitive damages award to $300,000. In *Waddill*, (Cont'd)

History shows that the disparity between the *BMW/Cooper* standard and the Oregon standard is outcome determinative, for there apparently is no punitive award that can fail to satisfy the "de novo" review of the Oregon Supreme Court. As a summary provided in *Key* shows (*see Key* Appendix, 118a), in the 15 post-*BMW* decisions (in addition to *Key*) in which punitive damages have been challenged, the Oregon Court of Appeals has allowed a remittitur only twice (in *Parrott* and *Jensen*).[9] The Oregon Supreme Court has never permitted a remittitur of a punitive award. It reversed the Court of Appeals' decision to remit in *Parrott*. 331 Or. at 565, 17 P.3d at 490.[10] *Jensen* is on review.

III. The Excessive Fines Clause Issue Merits Review.

The Respondent disputes whether the Excessive Fines Clause should apply (Opp. at 22-23), but not that there is a stark, unresolved conflict on this issue. *See* Petition at 23-24.

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the court acknowledged that the defendant in *Parrott* acted more reprehensibly than Anchor Hocking did. 175 Or. App. at 306 n.8, 27 P.3d at 1099 n.8 (17a).

9. *See Parrott v. Carr Chevrolet*, 156 Or. App. 257, 274-75, 282, 965 P.2d 440, 451, 455 (1998) (remittitur of $1 million punitive award to $300,000), *rev'd in relevant part*, 331 Or. 537, 565, 17 P.3d 473, 490 (2001); *Jensen v. Medley*, 170 Or. App. 42, 57-60, 11 P.3d 678, 688-89 (2000) (remittitur of $1.25 million punitive award to $175,000), *review allowed*, 334 Or. 411, 52 P.3d 436 (2002). The remittiturs in *Parrott* and *Jensen* were both based on *BMW*.

10. The Respondent ironically touts this reversal as proof that the Oregon courts review trial court decisions de novo. Opp. at 13-14. The Oregon Supreme Court's reversal, however, was not based on disagreement with the lower courts' application of an agreed legal standard. The lower courts applied *BMW*, and indeed, the Oregon Court of Appeals held that *BMW* superseded the "rational juror" standard. The Oregon Supreme Court reversed in *Parrott* because it rejected *BMW* in favor of the "rational juror" standard.

IV. *State Farm* Presents Sufficiently Similar Issues to Justify Holding This Case.

The Respondent opposes a hold pending this Court's disposition of *State Farm v. Campbell*, No. 01-1289 (set for argument December 11, 2002), contending that *State Farm* concerns only extraterritorial punishment and that Anchor Hocking has insufficiently preserved this issue. As discussed above, *State Farm* is not so limited. Even if it were, however, Anchor Hocking has properly raised the extraterritorial punishment issue. Anchor Hocking not only pointed to the extraterritorial nature of the Tennessee complaint, improperly used by the plaintiff to show its supposed conscious disregard for safety, it also challenged the plaintiff's use of Anchor Hocking's nationwide profits as a benchmark for punitive damages. Indeed, the plaintiff improperly urged the jury to surmise the existence of other complaints throughout the country, and to punish Anchor Hocking precisely because neither Anchor Hocking nor the plaintiff had evidence that any such complaints even existed.[11] Anchor Hocking consistently raised the extraterritorial punishment issue below, but no Oregon reviewing court ever considered it.

CONCLUSION

For the reasons stated here and in the Petition, as well as for the reasons stated in the American Insurance Association and Associated Oregon Industries amicus briefs in *Key*, this Court should review the judgment of the Oregon Court of Appeals. Alternatively, the Petition should be held pending disposition of *State Farm v. Campbell*, No. 01-1289.

Dated: November 12, 2002

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11. *See, e.g.*, Tr. 632 ("Are there really only three other complaints? Do they really only have those three?"); Tr. 617.

Respectfully submitted,

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